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C O N F I D E N T I A L SECTION 01 OF 02 MANILA 004933

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TAGS: [PREL](#) [MARR](#) [KCRM](#) [CASC](#) [RP](#)
SUBJECT: UNDERSTANDING THE SEIZURE OF LANCE CORPORAL SMITH

REF: MANILA 4920 AND PREVIOUS

Classified By: DCM Paul W. Jones, for reason 1.4 (d)

¶1. (C) The decision by Makati City Regional Trial Court Judge Pozon on December 4 to order the temporary confinement of convicted Lance Corporal Daniel Smith in the Makati City Jail, rather than release him back to the custody of U.S. authorities, took us and the defense attorneys by surprise (although, perhaps not to the Makati City police in the courtroom). However, it is not necessarily unjustifiable in terms of the judge's own competency. Not an expert on international law in general or on the Visiting Forces Agreement specifically, Judge Pozon probably proceeded as he would ordinarily at the conclusion of a trial with a guilty verdict. What he appears to have been waiting for was an explicit legal motion or written document from a competent Philippine authority (i.e. the Department of Justice or Foreign Affairs) confirming that the U.S. should appropriately retain custody of Lance Corporal Smith until the end of all judicial proceedings according to the VFA. The Embassy has been pressing senior Philippine Government officials since immediately after the verdict on December 4 to submit such documentation. After the DFA again declined our request to sign such a document on December 8, our Justice Attache was able to convince the Chief State Prosecutor to do so. The defense attorneys then submitted this to Judge Pozon with a request to return Lance Corporal Smith to U.S. custody immediately. Judge Pozon, however, rejected this document and called for one signed by a Cabinet Secretary. Our Justice Attache was able to obtain Justice

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Secretary Gonzalez' signature on this document late on

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December 8, and the defense attorneys submitted it to Judge Pozon for consideration. Judge Pozon received the document, but said he would hold a hearing on December 11 at which the private prosecutor in the case could also present her arguments against this transfer.

¶2. (C) There are various possible explanations for the lack of appropriately, timely action by the judge and the government. The heretofore-obscure Judge Pozon may be enjoying his moment in the sun, and burnishing his nationalist credentials by ordering the seizure by Philippine authorities of the new convict, with an eye on a future political career or promotion within the judicial hierarchy. Even if this is true, we do not believe he will block the transfer of custody indefinitely, given what GRP officials assure us across the board is their full recognition of the U.S. right to continued custody, their intent to "fix" this problem "quickly," and their reaffirmations of the VFA.

¶3. (C) Others within the Philippine Government, especially the DFA, may also be using this case as leverage to get what

they have sought for the past year regarding the VFA, including the transfer to Philippine custody of the defendants in this case. DFA also has also consistently sought agreement from the U.S. that we would keep any defendants in the Philippines throughout the judicial proceedings (i.e. not send them back to Okinawa). Moreover, DFA officials have also been clear with expectations that any defendants whose convictions are upheld at the end of the judicial proceedings would indeed end up in an existing Philippine detention facility, which goes well beyond what the VFA calls for, which is mutual agreement on a place of detention. The DFA asked the Embassy to agree to send a diplomatic note that confirmed the latter two points on December 7, which we rejected, insisting instead that we concentrate on resolving the current Philippine violation of the VFA.

¶4. (C) In the Byzantine world of Philippine politics and personalities, the range of other motives are endless. The lack of timely government action could reflect a reluctance by Cabinet members to attach their names to a document requesting Lance Corporal Smith's transfer to U.S. custody in advance of next year's Congressional elections, or even a feud between Cabinet members that remains below the radar scope. Or, during the ongoing machinations for Constitutional change through a constituent assembly -- in which Malacanang is interested but is not the driving force -- this issue might be a useful distraction to keep the Senate, in particular, off base. Or it could be another effort to undermine the Arroyo Administration by Makati City Mayor Binay, who controls the local police and may have private links with the Makati City Regional Trial Court Judge. We may never know the full story.

¶5. (C) But what is notable is that there are very few public calls by prominent individuals, in politics or outside, for the Philippines to retain custody at this point. There is little vocal opposition to returning Lance Corporal

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Smith to U.S. custody during the remainder of judicial proceedings. Even protests by the usual leftist and feminist groups are unusually muted. All this suggests that we will, indeed, end up in the coming days with custody again of Lance Corporal Smith. With the submission of the DOJ document today, we believe that a solution is in the works, and that it remains premature to weigh other USG options, although we have an extensive list ready should that need come next week. We are prepared for an imminent transfer of custody, and are coordinating with the Chief of the Philippine National Police to ensure full security for Lance Corporal Smith during the transfer once it ultimately takes place.

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